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**IN THE**
**COURT OF CRIMINAL APPEALS OF TEXAS**
**AT AUSTIN**

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**THE STATE OF TEXAS,**
**Petitioner**
**v.**

**KEVIN CASTANEDANIETO,**
**Respondent**

---

*From the Court of Appeals for the*
*Fifth District of Texas at Dallas*
*In cause Numbers 05-18-00870-CR,*
*05-18-00871-CR, and 05-18-00872-CR*

---

# STATE'S PETITION FOR DISCRETIONARY REVIEW

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*Oral argument is requested.*

## IDENTITY OF JUDGE, PARTIES, AND COUNSEL

Trial Judge: The Honorable Andrew J. Kupper, Visiting Judge
Criminal District Court Number Six
Dallas County, Texas

Petitioner: The State of Texas

Represented by: John Creuzot, Criminal District Attorney

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## TABLE OF CONTENTS

## INDEX OF AUTHORITIES

**Cases**

**Statute**



**Rule**

**TO THE HONORABLE COURT OF CRIMINAL APPEALS:**

The State of Texas respectfully urges this Honorable Court to grant discretionary review of the opinion of Dallas Court of Appeals. When this Court previously considered this case, it clearly explained that there is a significant factual difference between not understanding one's *Miranda* and article 38.22 warnings and being coerced into making a statement and stated that the former does not implicate a traditional "taint" analysis. The court of appeals concluded Castanedanieto's lack of understanding in his first interview tainted the second interview under the "cat out of the bag" rationale. Did the court of appeals properly analyze the lack-of-understanding theory Castanedanieto preserved in the trial court? No, it did not.

## STATEMENT REGARDING ORAL ARGUMENT

The State requests oral argument. This Court previously reversed the decision of the court of appeals, which had affirmed suppression of Castanedanieto's second interview with the police, because the court of appeals relied on a theory of law that was not applicable to the case. On remand, the court of appeals once again refused to apply the proper analytical framework. The court of appeals has analyzed and decided the issues in these cases in a manner that conflicts with the applicable decisions of this Court and the United States Supreme Court; moreover, the court of appeals so far departed from the accepted course of judicial proceedings that review is necessary. *See* Tex. R. App. P. 66.3(c), (f).

## STATEMENT OF THE CASE

The State charged Castanedanieto with three aggravated robberies arising from the same transaction. (CR1: 10; CR2: 9; CR3: 9).[1] *See* Tex. Penal Code Ann. §29.03(a)(2). Castanedanieto filed pretrial motions in cause numbers F17-57212-X and F17-57213-X, requesting a hearing prior to the introduction of any statements he allegedly made.[2] (CR1: 58; CR2: 57). On July 30, 2018, the trial court heard evidence and arguments on the pretrial motions. (RR: 10). After the trial court granted the motion to suppress, the State filed a motion for reconsideration. (CR1: 83). The trial court denied the State's motion and signed the order granting Castanedanieto's suppression request the next day. (CR1: 107; CR2: 82 CR3:30; RR: 49). The trial court did not issue findings of fact and conclusions of law.

The State filed a timely notice of appeal, and on October 3, 2019, the Dallas Court of Appeals affirmed the trial court's ruling. (CR1: 108; CR2: 84; CR3: 27); *State v. Castanedanieto*, Nos. 05-18-00870—872-CR, 2019 WL 4875340, at *1 (Tex. App.—Dallas Oct. 3, 2019), *rev'd*, 607 S.W.3d 315 (Tex. Crim. App. 2020).

[1] The clerk's records are designated as "CR1" for trial court cause number F17-57212-X (appellate cause number 05-18-00870-CR); "CR2" for trial court cause number F17-57213-X (appellate cause number 05-18-00871-CR); and "CR3" for trial court cause number F18-00407-X (appellate cause number 05-18-00872-CR).

[2] Castanedanieto did not file any pretrial motions in trial court cause number F18-00407-X.

This Court granted the State's petition for discretionary review on February 12, 2020. On September 16, 2020, the Court reversed the court of appeals' decision and remanded the case for further analysis. *State v. Castanedanieto*, 607 S.W.3d 315, 330 (Tex. Crim. App. 2020) ("The court of appeals has not addressed the theories of law that Applicant presented to the trial court."). On remand, the court of appeals again affirmed the trial court's ruling. *Castanedanieto v. State*, Nos. 05-18-00870—872-CR, 2021 WL 972901, at *1, 7 (Tex. App.—Dallas Mar. 16, 2021, pet. filed) (mem. op. on remand, not designated for publication).

## STATEMENT OF PROCEDURAL HISTORY

In an opinion issued on March 16, 2021, the Dallas Court of Appeals affirmed the trial court's suppression order. The State did not file a motion for rehearing. The State now submits this petition for discretionary review.

## GROUND FOR REVIEW

Contrary to this Court's prior decision in this case, the court of appeals expressly defied the ordinarily applicable rules for examining a waiver of a defendant's rights under *Miranda* and article 38.22 of the Texas Code of Criminal Procedure by applying the "cat out of the bag" coercion theory to Castanedanieto's claim that his second police interrogation waiver was unknowing.

## ARGUMENT

The court of appeals again failed to properly examine the legal theories advanced by the defendant in the trial court. Appellate courts review a trial court's ruling on a motion to suppress under a bifurcated standard of review. *Brodnex v. State*, 485 S.W.3d 432, 436 (Tex. Crim. App. 2016); *Guzman v. State*, 955 S.W.2d 85, 87-90 (Tex. Crim. App. 1997). The trial court's factual findings are reviewed for an abuse of discretion, but the court's application of the law to the facts is reviewed de novo. *State v. Cortez*, 543 S.W.3d 198, 203 (Tex. Crim. App. 2018). When the trial court does not enter findings of fact and conclusions of law, the reviewing court should presume the trial court made implicit findings that supported the ruling, as long as those findings are supported by record evidence. *State v. Ross*, 32 S.W.3d 853, 855-56, 859 (Tex. Crim. App. 2000). The trial court's ruling must be upheld if it is reasonably supported by the record and correct under any applicable theory of law. *Wade v. State*, 422 S.W.3d 661, 667 (Tex. Crim. App. 2013). To be an applicable theory of law, the appealing party must have had an adequate opportunity to develop a complete factual record with regard to that theory in the trial court. *Castanedanieto*, 607 S.W.3d at 327.

The State has the burden of showing that a defendant knowingly, intelligently, and voluntarily waived his *Miranda* rights. *Miranda v. Arizona*, 384 U.S. 436, 475 (1966). The State must prove waiver by a preponderance of the evidence. *Colorado*

*v. Connelly*, 479 U.S. 157, 168 (1986). A waiver need not assume a particular form and, in some cases, a "waiver can be clearly inferred from the actions and words of the person interrogated." *North Carolina v. Butler*, 441 U.S. 369, 373 (1979). Only if the "totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the defendant has waived his *Miranda* rights. *Joseph v. State*, 309 S.W.3d 20, 25 (Tex. Crim. App. 2010). Thus, a waiver has two distinct dimensions: one of coercion and one of understanding. *Moran v. Burbine*, 475 U.S. 412, 421 (1986). Understanding—knowing and intelligent—requires that the waiver "have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id*.

The test for voluntariness is whether the confession is the product "of an essentially free and unconstrained choice by its maker." *State v. Terrazas*, 4 S.W.3d 720, 723 (Tex. Crim. App. 1999) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973) and *Alvarado v. State*, 912 S.W.2d 199, 211 (Tex. Crim. App. 1995) (en banc)). Article 38.21 of the Texas Code of Criminal Procedure provides that an accused's statement may be used against him "if it appears that the same was freely and voluntarily made without compulsion or persuasion." Tex. Code Crim. Proc. Ann. art. 38.21. "The determination of whether a confession is voluntary is based on an examination of the totality of circumstances surrounding its acquisition." *Wyatt*

*v. State*, 23 S.W.3d 18, 23 (Tex. Crim. App. 2000) (quoting *Penry v. State*, 903 S.W.2d 715, 744 (Tex. Crim. App. 1995)).

In this case, Castanedanieto requested "a hearing prior to the introducing of any statements allegedly made by the Defendant, either orally or in writing, to determine the admissibility of same." (CR1: 58; CR2: 57). During the suppression hearing, his counsel argued that in the first police interview, Castanedanieto clearly did not understand his rights or the consequences of waiving them because he stated, "I don't understand." (RR: 35). Thus, counsel argued his client lacked full awareness of his rights. (RR: 37). Concerning the second interview, he argued that this lack of awareness carried over from the first confession to the second: "My client didn't gain an understanding of what he was doing under the Constitution in the intervening hours between confession 1 and confession 2. So the *Miranda* warnings given by the second detective don't cure the problem that we had from the first." (RR: 38). He also argued that because he was arraigned on the original robberies and "checked the box, said, Yes, I do want a court appointed lawyer," his Sixth Amendment right to counsel had attached and law enforcement violated those rights when a detective re-initiated contact in the second interview. (RR: 38-39).

In response, the State noted that Castanedanieto's motion was pursuant to articles 38.22 and 38.23 of the Texas Code of Criminal Procedure and reiterated that the State was only seeking to admit the second interview in which the detective read

Castanedanieto his warnings, and then he nodded and stated, "Yes." (RR: 41-42). Furthermore, he was arraigned between the two interviews, and he was again informed of his rights in the second interview. (RR: 44). The State reiterated that it was not trying to admit or rely on the first interview because Castanedanieto admitted he consumed alcohol and drugs earlier in the evening; instead, the State sought to admit the second interview because he knowingly waived his rights in the second interview after the effects of any intoxicants had worn off. (RR: 44-45). The trial court granted the motion to suppress and denied the State's motion for reconsideration on Castanedanieto's Sixth Amendment claim. (RR: 60).

The court of appeals initially affirmed the trial court's order based on the theory of coercion and "cat out of the bag" thinking. This Court reversed, explaining that "[t]he court of appeals resolved the appeal on a coercion theory that was not a theory of law applicable to the case," and noting that the court of appeals had "not addressed the theories of law that [Castanedanieto] presented to the trial court." *Castanedanieto*, 607 S.W.3d at 330. The Court identified Castanedanieto's trial theories as "(1) that [Castanedanieto] did not understand the *Miranda*/Article 38.22 warnings in the first interview and that this lack of understanding carried over to the second interview, and (2) that the State violated [Castanedanieto's] Sixth Amendment right to counsel by reinitiating questioning after [he] had requested appointed counsel at arraignment." *Id*. at 326.

In this Court's prior opinion, the Court explained that the legal theories advanced by Castanedanieto "were of the sort that do not involve a traditional 'taint' analysis." *Id*. at 328-29. This Court noted that "in relying partially on a 'cat out of the bag' theory, the court of appeals used a 'taint' analysis," which was inapplicable because Castanedanieto claimed he did not understand his rights—not that he was coerced. *Id*. at 329. Indeed, while a coerced statement leads to a presumption that later statements are "fruit of the poisonous tree" and are admissible only if the taint is shown to be attenuated, a failure to comply with *Miranda* or article 38.22 gives rise to no such presumption and ordinarily does not bar statements made in a subsequent interview that does comply. *Id*. at 328.

Because coercion is not an applicable legal theory, the court of appeals should have examined Castanedanieto's second statement under the ordinarily applicable rules regarding *Miranda* and article 38.22; the court should also examine Castanedanieto's claim that his Sixth Amendment right to counsel was violated. The court failed to do so. Instead, the court of appeals declared that while this Court "stated in its opinion that '[Mr. Castanedanieto's] legal theories were of the sort that do not involve a traditional 'taint' analysis,'" "the record shows the circumstances here allowed for application of the exception to the 'ordinarily' applicable rules regarding *Miranda* and article 38.22." *Castanedanieto*, 2021 WL 972901, at *6 (quoting *Castanedanieto*, 607 S.W.3d at 328-29). The court then went on to

conclude that evidence in the record supports "a determination that Mr. Castanedanieto was motivated at least in part by 'cat out of the bag' thinking, and nothing in the second video indisputably demonstrates he was not." *Id*. at *7.

The court of appeals continued to improperly apply the "cat out of the bag" theory to the facts in this case, but the United States Supreme Court has confirmed this theory is of limited value, and this Court has rejected this theory on the facts or found it "not determinative" in multiple cases. *See Oregon v. Elstad*, 470 U.S. 298, 314 (1985); *Griffin v. State*, 765 S.W.2d 422, 428 (Tex. Crim. App. 1989); *Bell v. State*, 724 S.W.2d 780, 793 (Tex. Crim. App. 1986).

Making a confession under circumstances that preclude its use does not "perpetually disable[] the confessor from making a usable one after those circumstances have been removed." *Griffin*, 765 S.W.2d at 428 (quoting *United States v. Bayer*, 331 U.S. 532, 541 (1947)). Neither this Court nor the United States Supreme Court have "held that the psychological impact of the voluntary disclosure of a guilty secret qualifies as State compulsion or compromises the voluntariness of a subsequent informed waiver" of the right to remain silent. *Griffin*, 765 S.W.2d at 429 (quoting *Elstad*, 470 U.S. at 312). The effect of giving a statutorily inadmissible statement or the voluntariness of a subsequent statement is determined from the totality of the circumstances, with the State bearing the burden of proving

voluntariness by a preponderance of the evidence. *Griffin*, 765 S.W.2d at 429-30; *Horton v. State*, 78 S.W.3d 701, 706 (Tex. App.—Austin 2002, pet. ref'd).

The rationale of this Court's decision in *Griffin v. State*, and its federal predecessors *United States v. Bayer* and *Oregon v. Elstad*, is that there is no presumption mandating the precise inferential leap made by the court of appeals in this case. Instead of inferring that a defendant gave a second statement because he felt he had nothing to lose since he already gave the first statement, there must be evidence in the record that a defendant would not have given the second statement but for the earlier one. *See Griffin*, 765 S.W.2d at 431. Thus, the court of appeals decided this case in a manner that conflicts with this Court's direct order to address the legal theories Castanedanieto advanced at the suppression hearing—namely, his claim that he did not understand the warnings that were given pursuant to *Miranda* and article 38.22 and his claim of an alleged violation of his Sixth Amendment right to counsel. These theories of law have been thoroughly briefed to the court of appeals, and the law applicable to these issues is also clear.

While this Court previously declined to opine on whether the State would prevail against Castanedanieto's lack-of-understanding claim, the Court provided useful guidance for how the claim should be addressed. In doing so, the Court listed the factors that "largely blunted" any incentive for the State to introduce evidence regarding the circumstances surrounding the first interview:

> First, as we have just discussed, in assessing compliance with *Miranda* or Article 38.22, an interview typically stands on its own. Second, the record as it stood provided an obvious explanation for concluding that there was no carry-over of any confused mental state on [Castanedanieto's] part from first interview to the next. The first interview occurred in the wee hours of the morning after [he] had used drugs. The second interview occurred almost two days later, in the evening, after [he] had eaten. Third, [Castanedanieto's] rights had been explained to him previously by a magistrate. The second interview would have been the third occasion for [him] to hear his rights and the second one to do so after having the opportunity to sleep and have the effects of drugs wear off.
>
> …
>
> That would all change if [Castanedanieto's] claim had been that Detective Thayer coerced his participation in the first interview. Coercion would carry a presumptive taint that the State would have to show was attenuated.

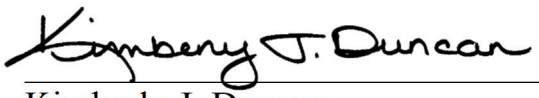
*Castanedanieto*, 607 S.W.3d at 329.

Despite this Court's guidance and a record that shows a knowing waiver, the court of appeals failed to examine Castanedanieto's second interview under the proper framework. This failure provides a basis for granting review. Further, the court of appeals revitalized and expanded a dying doctrine by relying on "cat out of the bag" thinking to affirm the trial court's suppression order. This case presents an opportunity for this Court to publish an opinion clarifying the applicability of this doctrine. Accordingly, this Court should grant the State's petition for review.

## PRAYER

The State respectfully prays that this Court grant the State's petition for discretionary review and reverse the decision of the court of appeals.

Respectfully submitted,



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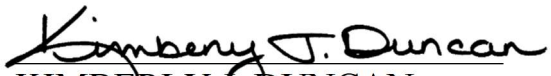
## CERTIFICATE OF COMPLIANCE

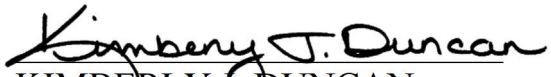
I hereby certify that of the foregoing brief, inclusive of all contents, is 3,492 words in length, according to Microsoft Word, which was used to prepare the brief, and that the foregoing brief complies with the word-count limit and typeface conventions required by the Texas Rules of Appellate Procedure.



KIMBERLY J. DUNCAN
Assistant District Attorney

## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing brief has been served on the Honorable Allan Fishburn, Counsel for Respondent Kevin Castanedanieto, and on the State Prosecuting Attorney, via electronic service on April 10, 2021.



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Assistant District Attorney

# APPENDIX

**OPINION on REMAND; Opinion Filed March 16, 2021**

**In the**
**Court of Appeals**
**Fifth District of Texas at Dallas**

**No. 05-18-00870-CR**
**No. 05-18-00871-CR**
**No. 05-18-00872-CR**

**THE STATE OF TEXAS, Appellant**
**V.**
**KEVIN CASTANEDANIETO, Appellee**

**On Appeal from the Criminal District Court No. 6**
**Dallas County, Texas**
**Trial Court Cause Nos. F17-57212-X, F17-57213-X, & F18-00407-X**

# MEMORANDUM OPINION ON REMAND

Before Justices Partida-Kipness, Carlyle, and Smith[1]
Opinion by Justice Carlyle

This case is before us on remand from the Texas Court of Criminal Appeals (CCA). The State appeals the trial court's order suppressing appellee Kevin Castanedanieto's oral statement to police. On original submission, we affirmed the trial court's order.[2]

[1] Justice Smith has substituted on the submission panel. He has reviewed the briefs and record in this case.

[2] *See State v. Castanedanieto*, Nos. 05-18-00870-CR, 05-18-00871-CR, & 05-18-00872-CR, 2019 WL 4875340, at *3 (Tex. App.—Dallas Oct. 3, 2019), *reversed*, 607 S.W.3d 315 (Tex. Crim. App. 2020). A

On the State's petition for review, the CCA reversed our judgment and remanded the case to us with an instruction to "address[] the theories of law that Applicant presented to the trial court." *State v. Castanedanieto*, 607 S.W.3d 315, 330 (Tex. Crim. App. 2020). Consistent with that instruction, for the reasons that follow, we again affirm the trial court's order.

**Background**

We adopt the CCA's' recitation of this case's factual background, *id*. at 317–24, and provide only the facts necessary to decide this appeal. Mr. Castanedanieto was arrested for aggravated robbery in the early morning hours of August 10, 2017. At that time, he was eighteen years old and had emigrated from El Salvador five years earlier. Shortly after his arrest, around 3:00 a.m., he was interviewed by Detective Thayer of the Dallas Police Department. That interview was video recorded. Detective Thayer elicited Mr. Castanedanieto's personal information, conveyed warnings required by *Miranda*[3] and Texas Code of Criminal Procedure article 38.22[4], then proceeded with questioning:

> DETECTIVE: . . . [S]o you came here 5 years ago. Did you go to school?
> APPELLEE: Yes, sir.
> DETECTIVE: Did you graduate?
> APPELLEE: *Shakes head no*
> DETECTIVE: Didn't graduate?

member of this Court's original submission panel dissented. *See* 2019 WL 4875340, at *5 (Bridges, J., dissenting).

[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[4] TEX. CODE CRIM. PROC. art. 38.22.

APPELLEE: No, almost.
. . . .
DETECTIVE: So do you stay with your uncle now?
APPELLEE: Mhmm.
DETECTIVE: Where does he stay at? Garland?
APPELLEE: Yes.
DETECTIVE: What's the address?
APPELLEE: I don't know the address, but he lives off of Walnut Street.
. . . .
DETECTIVE: Okay. Well I'm going to read these to you. You have the right to remain silent and not make any statement at all, and any statement you make may be used against you at your trial. Any statement you make may be used as evidence against you in court. You have the right to have a lawyer present to advise you prior to and during any questioning. If you're unable to employ a lawyer, you have the right to have a lawyer appointed to advise you prior to and during any questioning. And you have the right to terminate the interview at any time. Do you understand the rights I have read to you?
APPELLEE: *Shakes hand so/so*
DETECTIVE: A little bit? Okay—Well are you—
APPELLEE: It's just 'cause I don't speak a lot of English.
DETECTIVE: Can you read Spanish?
APPELLEE: Yes.
DETECTIVE: Okay, read that for me and tell me if you understand.
APPELLEE: [Reads rights out loud in Spanish]
DETECTIVE: Okay, do you understand?
APPELLEE: *Nods affirmatively*
DETECTIVE: Okay. Are you willing to talk to me—
APPELLEE: Um—
DETECTIVE: —and try to figure this all out?
APPELLEE: It's 'cause—um—I don't understand.
DETECTIVE: Okay, let's talk about what happened tonight.
APPELLEE: Yes, sir.

Mr. Castanedanieto then described his activities that led to his arrest.

That evening, Mr. Castanedanieto was arraigned before a magistrate, who informed him of a number of rights and warnings, including those required by

*Miranda*. When asked whether he wanted an appointed lawyer, Mr. Castanedanieto informed the magistrate that he did.[5]

The next evening, August 11, Dallas police detective Olegario Garcia went to the jail and asked Mr. Castanedanieto if he would come to police headquarters for an interview. Mr. Castanedanieto agreed, and that interview was also video recorded. Detective Garcia began the interview by eliciting basic identifying information (name, address, date of birth), asking about family members, and inquiring about life in El Salvador. Then he stated as follows:

> DETECTIVE: Alright, basically we're going to go over everything that you talked about with the other Detective and now that you've had a couple days to think about stuff maybe you might remember something that you didn't or you might have some questions of your own for me that I'll try to answer, okay? If I don't know the answer, I'll tell you. And if I do, you know I'll be honest with you and give you the information. Okay?
> APPELLEE: I'm gonna do the same, ask me anything you want. I'll tell you, I'm going to tell you the truth.
> DETECTIVE: Alright, [the other detective] read this to you. But everybody who comes in here, we read this to you. You have the right to remain silent and not make any statement at all and any statement you make may be used against you at your trial. Any statement you make may be used against you as evidence in court. You have the right to have a lawyer present to advise you prior to and during any questioning. If you're not able to employ a lawyer you have the right to have a lawyer appointed to you to advise you prior to or during any questioning, and you have the right to terminate the interview at any time. Do you understand the rights I read to you?
> APPELLEE: Yes, sir.
> DETECTIVE: Alright, are you willing to talk to me about, basically going over everything?

[5] The next day, Mr. Castanedanieto was appointed an attorney, but that attorney declined representation. Three days later, Mr. Castanedanieto was appointed the attorney who represented him in the trial court.

> APPELLEE: Yeah, I'm gonna tell you—I'm gonna start by basically saying what it was I was doing.

As the interview continued, Mr. Castanedanieto again described his activities leading to his arrest.

Defense counsel filed an omnibus pretrial motion, which included the following sentence: "Defendant requests a hearing prior to the introduction of any statements allegedly made by the Defendant, either orally or in writing, to determine the admissibility of same." At the suppression hearing, defense counsel initially claimed the statements from the first interview should be suppressed because Mr. Castanedanieto "didn't demonstrate a full awareness of the rights he was waiving and [the] meaning of the waiver of those rights." As for the statements from the second interview, defense counsel stated that "we carry 1 over to number 2, but additional grounds for number 2 is the State reinitiated contact, not the defendant," and therefore the statements from the second interview were inadmissible.

The State responded that it sought to admit only the statements from the second interview. In support of its position, the State called Detective Garcia, the sole live witness at the suppression hearing. Detective Garcia stated that at the time of the second interview, he had been "informed that [Mr. Castanedanieto] had given some confessions" to cases other officers were investigating. The prosecutor asked the detective if he ever had any concerns that Mr. Castanedanieto was not understanding him in the interview. Detective Garcia answered, "No, I felt like he

understood what I was saying." When asked if that was based on "language, education level, mental acuity," the detective responded that it "seemed like he understood what I was saying, was able to respond properly to the questions I was asking. He had an understanding of slang words, you know. I think that showed me he was ingrained into the culture here in the United States." Detective Garcia further testified that when he finished reading the *Miranda* warnings, he asked Mr. Castanedanieto if he understood the rights that were read, and Mr. Castanedanieto responded, "Yes," and nodded his head. The prosecutor asked: "Did it seem, based on your communication with him, that he was voluntary—voluntarily telling you all of these things?" Detective Garcia responded, "Correct."

After the State rested, defense counsel had the first four minutes of the first interview played for the trial court, which included the portion described above. During closing argument at the hearing, defense counsel asserted, "[W]e're not talking about a language barrier. We're talking about whether or not the defendant understands his rights and the consequences of waiving them." Defense counsel stated:

> After the rights are read in English, he indicates that he doesn't understand English well enough to go over the legal parts, and so the officer has him read the card in Spanish, which he does.
>
> When he reads the card in Spanish, the officer proceeds and asks him if he understands. The defendant clearly, when he refers to, "I don't understand," is referring to the waiver of his rights and the consequences of waiving them. And under *Moran vs. Burbine*, that is a lack of awareness of—you can't waive your rights if you don't have a

> full awareness of the nature of the right being abandoned and the consequences of doing so.
>
> . . . We have him expressing he doesn't understand. . . . In this case, the defendant expressed the fact that he did not understand the rights that he was waiving.

Defense counsel then contended this lack of understanding necessarily carried over to the second interview:

> Now, that applies to the second confession in the following way: My client didn't gain an understanding of what he was doing under the Constitution in the intervening hours between confession 1 and confession 2. So the *Miranda* warnings given by the second detective don't cure the problem that we had from the first.

The defense also argued that the statements in the second interview were inadmissible because Mr. Castanedanieto asked for an appointed attorney at his arraignment, which occurred between the two interviews, and the police reinitiated contact with him in violation of the Sixth Amendment right to counsel. Defense counsel then summed up his claims: "And we request that you suppress the second confession on those two bases. Number 1, it was made without full awareness, which is the fruit of the poisonous tree from the first interrogation; and number 2, because the Sixth Amendment was clearly violated in attaining this second confession."

The prosecutor pointed out that, in addition to being informed of his rights in the first interview, Mr. Castanedanieto was informed of them again at the arraignment and yet again in the second interview. And the prosecutor contrasted the conditions of the first and second interviews to explain how Mr. Castanedanieto's understanding of his rights could have differed at those two times:

> Your Honor, he was brought in to custody August 10th in the wee hours of the morning. And you saw from his statement on August 11th that he had been drinking for a week, that he had been smoking marijuana, that he had been partaking in cocaine for the first time. So any of his statements or what—where his mental state was when he was given the rights in English and again in Spanish have no bearing on what he understood when he was given those rights 48 hours later after a long period of sobriety in the jail.
>
> So we believe that to the first point, Kevin Castaneda-Nieto, when he sat down voluntarily with the detective on August 11th, did understand his rights, did knowingly waive those rights and did agree to speak voluntarily. Understanding that he did have the right to say, "I want my lawyer to be with me," understanding that he did have the right to remain silent and understanding that he could have ended that at any point in time, knowing those rights, he waived those rights and agreed to speak with the detective voluntarily.

After the trial court granted the motion to suppress, the State filed a motion for reconsideration based on the Sixth Amendment argument. Following a hearing on that motion, the trial court reaffirmed its original ruling granting the suppression motion.

**Analysis**

We review a trial court's ruling on a motion to suppress under a bifurcated standard of review. *State v. Staton*, 599 S.W.3d 614, 616 (Tex. App.—Dallas 2020, pet. ref'd) (citing *State v. Ruiz*, 577 S.W.3d 543, 545 (Tex. Crim. App. 2019)). We give almost total deference to the trial court's determination of historical facts and review de novo the application of the law to the facts. *Id*. When, as here, the trial court does not issue findings of fact, findings that support the trial court's ruling are implied if the evidence, viewed in a light most favorable to the ruling, supports those

findings.[6] *Turrubiate v. State*, 399 S.W.3d 147, 150 (Tex. Crim. App. 2013) (citing *State v. Kelly*, 204 S.W.3d 808, 818–19 (Tex. Crim. App. 2006)).

Under the "so-called *Calloway* rule," the trial court's ruling must be upheld if it is reasonably supported by the record and correct under any applicable theory of law. *State v. Esparza*, 413 S.W.3d 81, 89 (Tex. Crim. App. 2013). But "[a] legal theory is not applicable to the case if the appealing party did not have an adequate opportunity to develop a complete factual record with respect to the theory." *Castanedanieto*, 607 S.W.3d at 327 (citing *Esparza*, 413 S.W.3d at 90).

The State has the burden of establishing by a preponderance of the evidence that a defendant knowingly, intelligently, and voluntarily waived his *Miranda* rights. *E.g.*, *Leza v. State*, 351 S.W.3d 344, 349, 351 (Tex. Crim. App. 2011); *Joseph v. State*, 309 S.W.3d 20, 24 (Tex. Crim. App. 2010). In evaluating whether there was a valid waiver, a reviewing court must determine whether (1) the statement was a product of a free deliberate choice without intimidation, coercion or deception, and (2) the waiver was made with full awareness of both the nature of the right being abandoned and the consequences of abandoning that right. *Joseph*, 309 S.W.3d at 25 (citing *Moran v. Burbine*, 475 U.S. 412, 421 (1986)). Only if the "totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that *Miranda*

[6] The CCA has stated not only that we cannot ignore indisputable video evidence, *see State v. Duran*, 396 S.W.3d 563, 570–71 (Tex. Crim. App. 2013), but also that deference to the trial court is appropriate when video evidence did "not indisputably refute the trial court's finding." *State v. Gobert*, 275 S.W.3d 888, 892 n.13 (Tex. Crim. App. 2009).

rights have been waived. *Id*. The "totality-of-the-circumstances approach" requires consideration of "all the circumstances surrounding the interrogation," including the defendant's experience, background, and conduct. *Id*. (quoting *Fare v. Michael C.*, 442 U.S. 707, 725 (1979)).

If a statement is coerced, later statements are presumptively the fruit of the poisonous tree and are admissible only if the taint has been shown to be attenuated. *Castanedanieto*, 607 S.W.3d at 328. By contrast, a failure to comply with *Miranda* or article 38.22 in a prior interview gives rise to no such presumption and ordinarily does not bar statements made in a subsequent interview that does comply. *Id*. The only exception is when police use a two-step interrogation technique "in a calculated way to undermine the *Miranda* warning." *Id*. (quoting *Carter v. State*, 309 S.W.3d 31, 37 (Tex. Crim. App. 2010)).

To determine whether a first confession's inadmissibility tainted a second confession, a reviewing court considers the following factors: (1) did the condition rendering the first confession inadmissible persist through later questioning; (2) how long was the break in time between the two confessions; (3) was the defendant given renewed *Miranda* warnings; (4) did defendant initiate the police interview which resulted in the later confession; and (5) "any other relevant circumstances." *Sterling v. State*, 800 S.W.2d 513, 519 (Tex. Crim. App. 1990). "Other relevant circumstances" include (6) was the defendant taken before a magistrate to be warned of his rights between confessions; (7) was there particular evidence that defendant's

later confession was motivated by a desire to exculpate himself, rather than by any earlier improper influences brought to bear on him; (8) did the defendant remain in custody between the confessions; (9) did the defendant confer with counsel between confessions, or make any kind of request for counsel; and (10) was there particular evidence to suggest that defendant was motivated by "cat out of the bag"[7] thinking—i.e., he gave the second confession when he otherwise might not have because he had already given the first one. *Id.* at 519–20.

Here, the State's sole issue on appeal asserts, "The trial court erred in suppressing Appellee's second confession. The ruling is wrong under any theory of law."[8] In reversing this Court's original opinion, the CCA concluded our opinion was based on a "coercion theory" as to which the State did not have an adequate opportunity to develop a complete factual record. *Castanedanieto*, 607 S.W.3d at 330. Pursuant to the CCA's instruction, we now focus on a theory the CCA described

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[7] In *United States v. Bayer*, 331 U.S. 532, 540–41 (1947), Justice Jackson wrote,

> [A]fter an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession may always be looked upon as fruit of the first. But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed.

We refer to this line of cases as a potential basis for the trial court's action, as we must in our role as an appellate court. It is not to be read as broadening the "cat out of the bag" theory, which is distinctly cabined as a basis in Texas law for either (1) suppression in the trial court or (2) reversing the denial of suppression.

[8] The State's brief also restates the issue as follows: "The trial court erred in suppressing Appellee's second confession because Appellee's confession was given knowingly, intelligently, and voluntarily, and Appellee's Fifth and Sixth Amendment rights to counsel were not violated."

as having been presented to the trial court: "that Appellee did not understand the *Miranda*/Article 38.22 warnings in the first interview and that this lack of understanding carried over to the second interview."[9] *Id*. at 326.

The State asserts in its appellate brief:

> Instead of attacking the second interview, Appellee attempted to bootstrap the two interviews and argued that the first interview was inadmissible; therefore, the second one was also. However, he conceded at the hearing that his complaint was not due to a language barrier but that because Appellee lacked awareness of his rights in the first interview and that deficiency was not attenuated in the intervening hours between interviews, the second interview was tainted. However, the record reveals this is not the case and the two interviews were distinct and under different circumstances. Assuming, without conceding, the first interview—which was not offered by the State—was obtained without Appellee's awareness of his rights, it did not taint the second interview.
>
> . . . .
>
> . . . Finally, there was no indication that Appellee would not have given that confession but for the fact that he gave the first one. Appellee also confessed to other uncharged offenses during the interview. Even if the first interview was tainted, there was sufficient evidence presented by the State to show that the second interview was not. Appellee's argument to the trial court was not supported by the record, does not involve facts of credibility or demeanor, and is without merit.

The video recording of the first interview shows that though Mr. Castanedanieto nodded his head when asked if he understood the Spanish-language text he read aloud, Detective Thayer asked him immediately thereafter if he was "willing to talk" and he stated, "It's 'cause—um—I don't understand." Detective

[9] In light of its conclusion that this Court's original opinion was based solely on an undeveloped "coercion theory," the CCA specifically declined to address the "lack-of-understanding" theory in its reversal opinion. *See id*. at 329 ("We need not and do not decide whether the State would prevail against Appellee's lack-of-understanding claim.").

Thayer stated "okay" and then began questioning Mr. Castanedanieto. Based on the "totality of the circumstances," including Mr. Castanedanieto's emigration from El Salvador and his education level, we conclude the trial court reasonably could have determined Mr. Castanedanieto's waiver of his rights in the first interview was not made knowingly and intelligently.[10] *See Joseph*, 309 S.W.3d at 25.

The CCA stated in its opinion that "[Mr. Castanedanieto's] legal theories were of the sort that do not involve a traditional 'taint' analysis." *Castanedanieto*, 607 S.W.3d at 328–29. Regardless, the record shows the circumstances here allowed for application of the exception to the "ordinarily" applicable rules regarding *Miranda* and article 38.22. *See id*. at 328. The record supports a reasonable inference of police awareness of Mr. Castanedanieto's stated lack of understanding as to his rights in the first interview. Yet Detective Garcia proceeded to initiate a second interview that he specifically described to Mr. Castanedanieto as being based on what was said in the first interview, thus necessarily implying, prior to giving any warnings in the second interview, that everything previously said by Mr. Castanedanieto—a young immigrant with limited education—could already be properly used against him. On this record, to the extent the trial court inferred an effort to undermine Mr.

[10] The dissenting justice in our original opinion reached the same conclusion (before dissenting on other grounds): "I . . . acknowledge we are required to give almost total deference to the trial court's determination of demeanor even when that determination is based on a video recording. Thus, giving almost complete deference to the trial court's determination of historical facts, 'especially if those are based on an assessment of credibility and demeanor,' I must defer to the trial court's implicit finding that appellee's lack of understanding [in the first interview] referred to his *Miranda* rights." 2019 WL 4875340, at *8 (Bridges, J., dissenting).

Castanedanieto's rights, we cannot conclude such an inference was unreasonable. *See Carter*, 309 S.W.3d at 41 (applying "appropriately deferential standard of review" to trial court's determination of whether two-step police interrogation attempted to undermine *Miranda*).

The State contends "there was no indication that Appellee would not have given that confession but for the fact that he gave the first one" and thus any lack of understanding in the first interview did not affect the second statement. We disagree for essentially the same reasons described above. At the start of the second interview, Detective Garcia reminded Mr. Castanedanieto of his interrogation and confession the day before, stated "basically, we're going to go over everything that you talked about with the other Detective," and suggested Mr. Castanedanieto may have even more to tell the second time around. This reference to the former, improperly-obtained confession as having already irreversibly established the background and starting point for the present interview came before Detective Garcia conveyed any *Miranda* and article 38.22 warnings. On this record, we conclude the trial court had sufficient basis to conclude Mr. Castanedanieto's second confession was motivated, at least in part, by so-called "cat out of the bag" thinking.[11] *See Sterling*, 800 S.W.2d

[11] We need not approve the trial court's conclusion as the one we necessarily would have made, but cite this path of legal analysis as a potential suppression basis that was not an abuse of discretion. *See Esparza*, 413 S.W.3d at 89 (trial court's ruling must be upheld if it is reasonably supported by the record and correct under any applicable theory of law). We note that this legal theory is specifically addressed in the portion of the State's October 2018 opening appellate brief described above, without any mention of a lack of opportunity to develop the record in the trial court: "Finally, there was no indication that Appellee would not have given that confession but for the fact that he gave the first one. . . . Even if the first interview was tainted, there was sufficient evidence presented by the State to show that the second interview was not."

at 519–20; *see also State v. Duran*, 396 S.W.3d 563, 571 & n.23 (Tex. Crim. App. 2013) ("The winning side is afforded the 'strongest legitimate view of the evidence' as well as all reasonable inferences that can be derived from it." (citing *State v. Weaver*, 349 S.W.3d 521, 525 (Tex. Crim. App. 2011); *State v. Woodard*, 341 S.W.3d 404, 410 (Tex. Crim. App. 2011))). And this same analysis demonstrates how Mr. Castanedanieto's lack of understanding of his rights in the first interview "carried over into the second interview." *Castanedanieto*, 607 S.W.3d at 326.

We note that in *Oregon v. Elstad*, the Supreme Court walked back its recognition of the "cat out of the bag" theory as a basis for excluding confessions. *See* 470 U.S. 298, 314 (1985). The Court in *Elstad* stated,

> [A]bsent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights.

*Id*. But nothing in *Elstad*'s language requires reversal of a grant of suppression under these circumstances simply because the facts could be reweighed to possibly warrant a conclusion denying the suppression motion. Here, there is evidence to support a determination that Mr. Castanedanieto was motivated at least in part by "cat out of the bag" thinking, and nothing in the second video indisputably demonstrates he was not. *See Sterling*, 800 S.W.2d at 519. On this record, we conclude the trial court did

not abuse its discretion by granting Mr. Castanedanieto's motion to suppress his second statement.

We affirm the trial court's order.

/Cory L. Carlyle/
CORY L. CARLYLE
JUSTICE

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# Court of Appeals
# Fifth District of Texas at Dallas

## JUDGMENT

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|---|---|
| THE STATE OF TEXAS, Appellant | On Appeal from the Criminal District Court No. 6, Dallas County, Texas |
| No. 05-18-00870-CR V. | Trial Court Cause No. F17-57212-X. Opinion delivered by Justice Carlyle. |
| KEVIN CASTANEDANIETO, Appellee | Justices Partida-Kipness and Smith participating. |

Based on the Court's opinion of this date, the order of the trial court is **AFFIRMED**.

Judgment entered this 16th day of March, 2021.

# Court of Appeals
# Fifth District of Texas at Dallas

## JUDGMENT

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|---|---|
| THE STATE OF TEXAS, Appellant | On Appeal from the Criminal District Court No. 6, Dallas County, Texas |
| No. 05-18-00871-CR V. | Trial Court Cause No. F17-57213-X. Opinion delivered by Justice Carlyle. |
| KEVIN CASTANEDANIETO, Appellee | Justices Partida-Kipness and Smith participating. |

Based on the Court's opinion of this date, the order of the trial court is **AFFIRMED**.

Judgment entered this 16th day of March, 2021.

# Court of Appeals
# Fifth District of Texas at Dallas

## JUDGMENT

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| THE STATE OF TEXAS, Appellant | On Appeal from the Criminal District Court No. 6, Dallas County, Texas |
| No. 05-18-00872-CR V. | Trial Court Cause No. F18-00407-X. Opinion delivered by Justice Carlyle. |
| KEVIN CASTANEDANIETO, Appellee | Justices Partida-Kipness and Smith participating. |

Based on the Court's opinion of this date, the order of the trial court is **AFFIRMED**.

Judgment entered this 16th day of March, 2021.

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